UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GEORGE GUINDON et al. Plaintiffs vs. AMERICAN FOAM CORPORATION et al. Defendants	C. A. No. 03-335-L (Motion of Plaintiff Michelle Spence only)

PLAINTIFF MICHELLE SPENCE'S MOTIONS TO SEVER PURSUANT TO F.R.C.P. 21, AND TO CONSOLIDATE PURSUANT TO F.R.C.P. 42(a)

Now comes Plaintiff Michelle Spence and moves this Honorable Court for an order severing all claims and causes of actions brought by her, and on behalf of her minor child Haley Spence, as adopted, now pending in the matter of *George Guindon et al. v. American Foam Corporation et al.*, Civil Action No. 03-335 L, and consolidating said claims and causes of action for all purposes with the matter of Albert Gray et al. v. Jeffrey Derderian et al., Civil Action No. 04-312L.

As grounds, the Plaintiff relies upon the memorandum of law filed herewith.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GEORGE GUINDON et al.	:	
Plaintiffs	:	
vs.	:	C. A. No. 03-335-L
AMERICAN FOAM CORPORATION et al.	:	(Memorandum of Plaintiff Michelle Spence only)
Defendants	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF MICHELLE SPENCE'S MOTIONS TO SEVER PURSUANT TO F.R.C.P. 21, AND TO CONSOLIDATE PURSUANT TO F.R.C.P. 42(a)

Now comes Plaintiff MICHELLE SPENCE, by and through counsel, and files this, her Memorandum of Law in Support of her Motions to Sever Pursuant to F.R.C.P. 21, and to Consolidate Pursuant to F.R.C.P. 42(a).

TRAVEL

On August 8, 2003 a complaint was filed in the matter of *Guindon v. American Form Corporation*, Civil Action No. 03-335-L.[1] The complaint named several party

[1] A prior complaint had been filed by predecessor counsel in the Providence County Superior Court on March 4, 2003 naming Plaintiff Spence as a party. After one amendment, a notice of voluntarily dismissal was filed by predecessor counsel on August 12, 2003.

plaintiffs, including Michelle Spence.[2] At the time of filing, all plaintiffs named in the Guindon action were represented by the same lawyer. However, in May 2004 Plaintiff Spence retained current counsel to assume her legal representation. Counsel's entry of appearance on her behalf was filed in Guindon on June 3, 2004.

During this same period and up to the present time, Plaintiff's counsel has been working jointly with other counsel (as a member of the State Court Appointed Plaintiffs' Steering Committee, hereinafter 'PSC').[3] This work resulted in the filing of a 'Master Complaint' on July 22, 2004 commencing the action of Gray v. Derderian, Civil Action No: 04-312-L. On November 23, 2004, the PSC moved for leave to file a "First Amended Master Complaint." (hereinafter the 'FAMC') This motion was granted and the FAMC was filed on December 20, 2004.

The Court's order granting the motion to amend included a procedure by which other parties in related actions could adopt some or all of the allegations set forth in the FAMC. Utilizing this procedure, Plaintiff Spence filed a *Notice of Adoption* on January 18, 2005 adopting the FAMC in its entirety. Consequently, the allegations adopted by her (and the parties against whom they are being asserted) are now consistent with those of all Gray Plaintiffs.[4]

As the court is aware, numerous motions to dismiss have been filed by various defendants in Gray, Guindon and other related cases generating voluminous pleadings for review by the Court. In Gray, joint responses to these motions have been filed on behalf of all *Gray* plaintiffs by the PSC.[5] As a party in the *Guindon* matter, Plaintiff Spence has filed separate objections and memoranda to these same motions.[6] The pleadings filed by Plaintiff Spence have been, for the most part, duplicative of those filed by the PSC. However, as a party plaintiff in *Guindon* and not *Gray*, she is constrained to file her own responses although they are, within the larger context of these actions, repetitious.

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[2] The action was brought on Plaintiff's behalf both individually and in her capacity as parent and next friend of her daughter Haley Spence.

[3] See Pretrial Order No. 2 (Case Management Order) entered by the Superior Court on May 27, 2003.

[4] There are minor exceptions noted in the First Amended Master Complaint where a small number of plaintiffs have opted not to bring actions against certain defendants.

Counsel for Plaintiff Spence also finds himself in a position unique to all other plaintiff's counsel as the pleadings filed by the PSC on behalf of his clients in *Gray* must be filed *again* for his lone client Michelle Spence in the *Guindon* matter. In order to avoid future duplicative filings (and the responses they most assuredly will generate) that will place a further burden on the Court's resources in an otherwise complex proceeding characterized by voluminous pleadings, and the additional expenditure of valuable time and expense of both plaintiff and defense counsel, Plaintiff Spence seeks complete severance from the Guindon case and consolidation with the Gray case for all purposes.

LEGAL ARGUMENT

I. *Severance Pursuant to Rule 21*

Plaintiff Spence seeks severance from the *Guindon* matter pursuant to F.R.C.P. 21, which states in pertinent part:

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[5] Counsel herein represents the following *Gray* plaintiffs: The personal representatives of the estates of Matthew P. Darby, Tracey L. Romanoff, Eric J. Hyer, Bridgette M. Sanetti, and Laura L. Gillett; and the following injured; Scott C. Moresco, Mario and Kathleen Cardillo and Tammy M. St. Hilaire.

[6] Certain defendants have also filed reply memoranda that are also nearly identical to those filed in *Gray* and other actions.

> Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

"The decision to separate parties or claims is a case management determination "peculiarly within the discretion of the trial court . . ."" Acevedo-Garcia v. Monroig, 351 F.3d 547 at 558 (1st Cir. 2003) quoting Gonzalez-Marin v. Equitable Life Assurance Socy., 845 F.2d 1140, 1145 (1st Cir. 1988). The First Circuit has further observed that "courts of appeals accord broad latitude to district courts in this area." *Id*. (citations omitted). Moreover, a determination by the Court that there has been misjoinder "is not a prerequisite to severing parties or claims under Rule 21." Id. at 560, fn. 5. Rule 21 "authorizes the severance of any claim, even without a finding of improper joinder, where there are sufficient other reasons for ordering a severance." *Id*.

"As opposed to the mere separation of claims within a single action" provided for in Rule 42(b), the Plaintiff seeks "severance of all claims under Rule 21." *In re Brand-Name Prescription Drugs Antitrust Litigation*, 264 F.Supp.2d 1372 at 1376 (JudPan.Mult.Lit. 2003). Rule 42(b) contemplates severance of claims for trial "under a format in which each claim remains part of the overall action." *Id*. Herein, the Plaintiff moves for complete severance from the *Guindon* action under Rule 21 thereby creating a separate action that Plaintiff seeks to have consolidated with *Gray*.

II. *Consolidation Pursuant to Rule 42(a)*

Consolidation of Plaintiff's claims with *Gray* may be accomplished pursuant to F.R.C.P. 42(a). Plaintiff seeks consolidation 'for all purposes', including trial on the merits, so as to avoid needless duplicative additional filings, or replication of effort by plaintiff and defense counsel, and the taxing of Court's resources in an already complex proceeding. As set forth above, Plaintiff Spence has adopted the allegations contained in the FAMC in their entirety. Therefore, she stands in the same shoes substantively as the other Gray plaintiffs.

Plaintiff acknowledges the general rule in this Judicial Circuit that ""consolidation" for trial [does] not merge separate suits into a single action." *Albert v. Maine Central Railroad Company*, 898 F.2d 5 at 6 (1st Cir. 1990) citing *In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 at 441 (1st Cir. 1972). However, it is important to observe that this rule lacks uniformity among the many Circuits. See generally, Gaylord A. Virden, *Consolidation Under Rule 42 of the Federal Rules of Civil Procedure: The U.S. Courts of Appeals Disagree on Whether Consolidation Merges the Separate Cases and Whether the Cases Remain Separately Final for Purposes of Appeal*, 141 F.R.D. 169 (1991). Virden points out "the First Circuit stands firmly at one extreme among the Circuits." *Id.*

More importantly, in recognition of a situation akin to Plaintiff's herein, the court in *Massachusetts Helicopter* left the door ajar. In a footnote, the court stated that

> Whether, as Moore states, consolidated actions must remain separate actions under every conceivable set of circumstances is a question which need not be answered at this time. We can see, for example, that in cases such as *Tiernan* there may be no sense in prohibiting a court from consolidating identical actions to form one new action. No one would appear to be prejudiced and unnecessary paper work could be eliminated.

In re Massachusetts Helicopter Airlines, Inc., 469 F.2d 439 at 443, fn. 3, (1st Cir. 1972). The door was later opened in a case emanating from this District. *Jordan v. Kelley, M.D.*, 728 F.2d 1 (1st Cir. 1984). In *Jordan*, a case involving alleged unauthorized disclosure of confidential medical information by a psychiatrist during a custody proceeding, two separately filed actions were consolidated by the court. After consolidation, the District Court treated the two cases as one, as did the plaintiffs. Moreover, the plaintiffs in the two matters had "an identity of interests and propounded essentially identical theories of liability." Jordan v. Kelley, M.D., 728 F.2d at 4. Citing to Massachusetts Helicopter, the Jordan opinion stated parenthetically that a "court may consolidate identical actions to form one new action where neither party would be prejudiced." Id.

In a more recent decision, the court in Bay State HMO Management, Inc. v. Tingley Systems, Inc. observed "the essence of consolidation is that, even though the cases are technically separate actions, they are treated as a single action for particular purposes." 181 F.3d 174 at 178 (1st Cir. 1999). The opinion goes on to say that the *Johnson* Court did not state that consolidated actions must always be treated as separate actions *for all purposes*. Id. (emphasis in original).[7] The court determined it was "not bound by the statements in Massachusetts Helicopter . . . in making [its] decision" as that opinion dealt with a different question that that presented in Bay State HMO. Id.[8] The court's conclusion was that Massachusetts Helicopter was "inapplicable to cases consolidated into one action for all purposes." Id.[9] See also Global Naps, Inc.

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[7] Johnson v. Manhattan Ry. Co. 289 U.S. 479, 53 S.Ct. 721 (1933) was relied upon by the court in Massachusetts Helicopter.

[8] In Massachusetts Helicopter, the court addressed the question of whether an order terminating one of two or more consolidated cases is appealable absent a certification pursuant to F.R.C.P. 54(b) while Bay State HMO dealt with whether consolidated cases should be treated as a single action for the purpose of determining the res judicata effect of a settlement of some but not all cases.

[9] It must be noted it was "not at all clear" to the court as to what type of consolidation occurred in Bay State HMO; i.e. for "all purposes", which was the "type of complete consolidation that Massachusetts Helicopter declined to address"; or for "convenience of pre-trial and trial procedure." Id. at 178, fn. 2. Since the consolidation was "based largely upon convenience and efficiency" and the cases otherwise

v. Verizon New England, Inc., 396 F.3d 16 at 22, (1st Cir. 2005) "where disposition of one case in a consolidated action is a final and appealable judgment *unless the cases were consolidated "for all purposes."* (emphasis added).

Although the Plaintiff does not assert that a 'merger' of her causes of action with the Gray case is absolutely essential to achieving the stated goals of judicial economy and reduction of time and expense to the parties, she would suggest that with her adoption of the FAMC her action is now indeed identical to that of Gray and would clearly fit the scenario referenced in Massachusetts Helicopter and later clarified in Jordan.

CONCLUSION

For the reasons set forth herein, Plaintiff Michelle Spence requests that all causes of action adopted by her, and on behalf of her minor child, be severed from the matter of *Guindon v. American Foam Corp.* and thereafter consolidated with the matter of *Gray v. Derderian* for "all purposes."

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retained certain characteristics of being separate such as different case numbers and docket sheets, the court in *Bay State HMO* would not further distinguish *Massachusetts Helicopter* as urged by the defendant but rather chose to acknowledge the "limitation on *Massachusetts Helicopter* for what it is:

> recognition that consolidated cases may not necessarily retain their technical separateness in all instances and for all purposes.

Id. at 178, fn. 2.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, Administrator, et al. :
Plaintiffs :
VS. : C.A. NO. 04-312L
JEFFREY DERDERIAN, et al. :
Defendants :

AMENDED CERTIFICATION

See Plaintiff Michelle Spence's *Amended Certification* appended hereto and made a part thereof.

Plaintiff Michelle D. Spence
By her Attorneys,

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STEPHEN E. BREGGIA, #2865

Dated: March 11, 2005

AMENDED CERTIFICATION

I hereby certify that on the 10 day of March 2005 a true copy of the following:

- Plaintiff Michelle Spence's Motions To Sever Pursuant To F.R.C.P. 21, And To Consolidate Pursuant To F.R.C.P. 42(A)
- Memorandum Of Law In Support Of Plaintiff Michelle Spence's Motions To Sever Pursuant To F.R.C.P. 21, And To Consolidate Pursuant To F.R.C.P. 42(A)

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